SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1239

FIFTH STREET BUILDING, a Corporation,

vs.

CHARLES J. McCOLGAN, as Franchise Tax Commissioner of the State of California.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA.

STATEMENT AS TO JURISDICTION.

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INDEX.

Subject Index.

	Page
Statement as to jurisdiction	1
Statutory provisions sustaining jurisdiction	1
Statutes of the State the validity of which is involved.	2
Date of judgment and date of application for appeal.	4
Nature of case and rulings below	4
Substantiality of questions involved	9
Cases sustaining the jurisdiction	11
Appendix "A"—Opinion of the Supreme Court of California	13
Appendix "B"—Judgment of the Superior Court of California	16

Table of Cases Cited.

Fifth Street Building v. *McColgan, etc.*, 19 A. C. 164, 119 Pac. (2d) 729	6, 8
Fiske v. *Kansas*, 274 U. S. 380, 71 L. Ed. 1108	12
Hamilton v. *Regents of University of California*, 293 U. S. 245, 79 L. Ed. 343	9
Hanover Fire Insurance Co. v. *Carr*, 272 U. S. 494, 71 L. Ed. 372	12
Merchants National Bank v. *Richmond*, 256 U. S. 635, 65 L. Ed. 1135	12
State Tax Commissioner v. *Van Cott*, 306 U. S. 511, 83 L. Ed. 950	12
United Fuel Gas Co. v. *Hallanan*, 257 U. S. 277, 66 L. Ed. 234	12
Worcester County National Bank, Ex parte, 279 U. S. 347, 73 L. Ed. 733	12

Statutes Cited.

Act of Congress of June 18, 1934, 28 U. S. C. A. 124a	3, 7, 8, 9, 10, 11
Bank and Corporation Franchise Tax Act of California (Chapter 13 of the Statutes of California of 1929)	2, 9

Page

California Bank and Corporation Franchise Tax Act (California Statutes 1929, p. 19, as amended by California Statutes, 1935, pp. 959, 995, 1245 Deering's General Laws, 1937, Act 8488) 2, 9

Constitution of the United States, Article I, Sec. 8, Clause 1 ..... 3, 10

Tenth Amendment 3, 4, 10

United States Code, Title 28:

Section 344a 1, 12

Section 350 4

Section 861a 2

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. 17737

FIFTH STREET BUILDING, A CORPORATION,
Appellant,

vs.

CHARLES J. McCOLGAN, AS FRANCHISE TAX COMMISSIONER OF THE STATE OF CALIFORNIA,
Respondent.

STATEMENT IN SUPPORT OF JURISDICTION.

The appellant, Fifth Street Building, a corporation, in support of the jurisdiction of the Supreme Court of the United States to review the above entitled cause on appeal, respectfully represents:

A.

Statutory Provision Sustaining Jurisdiction.

The statutory provision which sustains the jurisdiction of the Supreme Court of the United States is Section 344, sub-section (a) of Title 28 of the United States Code, reading, to the extent relevent here, as follows:

"Sec. 344(a). Final judgment or decree in any suit in the highest court of a State in which a decision could

> be had * * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

The remedy by writ of error under the foregoing section has been abolished and an appeal substituted in its place by Section 861(a) of Title 28 of the United States Code.

B.

Statute of the State the Validity of Which is Involved.

The statute of the State of California, the validity of which has been sustained by the final decree and judgment of the Supreme Court of the State of California, the highest court of said State, as not being violative of or repugnant to the Constitution and laws of the United States is the "California Bank and Corporation Franchise Tax Act", California Statutes 1929, p. 19, as Amended by California Statutes 1935, pp. 959, 995, 1245 Deering's General Laws, 1937, Act 8488. The pertinent provisions thereof are:

> " * * * (3) CORPORATIONS OTHER THAN FINANCIAL DOING BUSINESS IN THIS STATE TO PAY TAX: MINIMUM TAX. With the exception of financial corporations, every corporation doing business within the limits of this State and not expressly exempted from taxation by the provisions of the Constitution of this State or by this act, shall annually pay to the State, for the privilege of exercising its corporate franchises within this State, a tax * * *".

The construction of said California Bank and Corporation Franchise Tax Act by said Supreme Court of the State of California was pursuant to and based upon the construc-

tion placed upon the Act of Congress of the United States of June 18, 1934, 28 U. S. C. A., Sec. 124(a), by the said Supreme Court of the State of California, and was repugnant to said Act. The pertinent provisions of said Act of Congress are:

> "Any * * * trustee, * * * appointed by any United States Court who is authorized by said Court to conduct any business, or who does conduct any business, shall from and after June 18, 1934, be subject to all State and local taxes applicable to such business the same as if such business were conducted by an individual or corporation."

The construction placed upon the provisions of the *Act of Congress* of June 18, 1934, 28 U. S. C., Sec. 124(a), by the Supreme Court of California, by reason of which it was held that the California Bank and Corporation Franchise Tax Act imposed a franchise tax on a trustee in bankruptcy, is believed to be repugnant to Article I, Section 8, Clause 1 of the Constitution of the United States, and repugnant to Amendment X of the Constitution of the United States.

The *California Bank and Corporation Franchise Tax Act,* as construed by the Supreme Court of the State of California is believed to be repugnant to Article I, Section 8, Clause 1 of the Constitution of the United States; to Amendment X of the Constitution of the United States and to said Act of Congress of June 18, 1934, 28 U. S. C. A., Sec. 124(a).

The pertinent provisions of said Article I, Section 8, Clause 1, United States Constitution, are as follows:

> "The Congress shall have power: To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

The provisions of Amendment X of the Constitution of the United States are as follows:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

C.

Date of Judgment and Date of Application for Appeal.

The date of the final decree and judgment of the Supreme Court of the State of California, which is now sought to be reviewed was December 5, 1941. Appellant's Motion for Rehearing was denied on December 31, 1941. The time for taking the appeal began to run on the date of the denial of said Motion for a Rehearing, to-wit, December 31, 1941.

The date on which the application for appeal was presented and the appeal allowed was February 28, 1942.

Under the provisions of Section 350 of Title 28 of the United States Code, the appellant may bring its appeal within three months after the entry of the decree of the Supreme Court of the State of California.

D.

Nature of Case and Rulings Below.

On December 30, 1934, Walker's, Inc., a California corporation, filed a voluntary petition in bankruptcy in the District Court of the United States, Southern District of California, Central Division, and was thereupon adjudged a bankrupt. Thereafter, Wm. H. Moore, Jr., was duly appointed trustee in said bankrupt estate, and remained said trustee during the period in controversy herein.

During the period in controversy herein, said trustee in bankruptcy, under authority of the aforesaid District

Court, carried on the business theretofore conducted by the bankrupt corporation (R. 1, 1.21, to R. 2, 1.6).

On March 9, 1937, the said trustee in bankruptcy filed a corporation franchise tax return under the provisions of Chapter 13 of the Statutes of California of 1929, known as the Bank and Corporation Franchise Tax Act, and paid a franchise tax for the year 1937 in the amount of $4,764.17 (R. 2, 1.8 to 1.24).

Said Franchise Tax Return was erroneously and illegally filed by said trustee, and the tax thereon was erroneously and illegally assessed and collected, and refund was erroneously denied (R. 5, 1.1 to 1.8).

The bankrupt corporation, Walker's, Inc., was duly discharged by the bankruptcy court in the year 1936, and during the period in controversy herein was privileged to and did exercise its franchise as a corporation *separate and independent from any business carried on by the aforesaid trustee in bankruptcy* (R. 4, 1.17 to 1.26). Said trustee in bankruptcy did not operate any business under the franchise granted by the State of California to Walker's, Inc. Said business was carried on by said trustee under and by virtue of the authority granted by the aforesaid District Court, and under and by virtue of the bankruptcy laws of the United States of America (R. 2, 1.26 to 3, 1.8).

The aforesaid trustee in bankruptcy duly filed a claim for refund of said 1937 franchise tax, which was denied (R. 3, 1.10 to 1.23) (R. 6 to 9).

Fifth Street Building, appellant herein, by order of the Federal Court, became the assignee of the claim for refund, and the owner of any right to a refund of the franchise tax paid by the trustee (R. 3, 1.25 to 4, 1.16) (R. 6 to 8).

The appellant herein sued for the recovery of the franchise tax paid by the trustee (R. 1 to 12). The respondent herein demurred (R. 15 to 21), the demurrer was over-

ruled (R. 22) and the respondent herein answered. The respondent herein in his answer did not deny any of the material allegations in the complaint (R. 13-14, 23, 24). Thereafter, motions for judgment on the pleadings were filed by both the appellant and respondent herein, and thereafter, to-wit, on September 17, 1940, judgment was rendered and entered in favor of the appellant herein and against the respondent herein for the refund of the aforesaid franchise tax (R. 23 to 25).

On September 28, 1940, said respondent appealed upon the judgment roll, to the Supreme Court of the State of California, from the said judgment of said Superior Court, by serving and filing in said Superior Court, his notice of appeal (R. 27 to 30).

On December 5, 1941, the Supreme Court of the State of California made and entered its judgment and decree wherein and whereby said Supreme Court reversed the said judgment and decree of said Superior Court. (19 A. C. 164; 119 Pac. (2d) 729).

On December 23, 1941, this appellant filed with the Supreme Court of the State of California, its Petition for Rehearing. Said Petition for Rehearing was, by said Supreme Court, denied on December 31, 1941.

The Act of Congress of June 18, 1934, was first mentioned by respondent in Points and Authorities in support of his Demurrer (R. 20, 1.2 to 1.26).

The effect and constitutionality of said Act of June 18, 1934, was argued by the appellant and the respondent, through their respective briefs, before the Supreme Court of California.

The Supreme Court of the State of California, in its judgment and decree, placed a construction upon the Corporate Franchise Tax Act of California based upon its

construction of the said Act of Congress of June 18, 1934.

The constitutionality of the said Franchise Tax Act of California, by reason of, and under the construction placed thereon, by the Supreme Court of the State of California in its said judgment and decree, was challenged by the appellant herein in its said Petition for Rehearing addressed to said Supreme Court of the State of California.

The Supreme Court of the State of California Held:

1. That the California Bank and Corporation Franchise Tax Act imposes a tax *upon the transaction of business* by a trustee in bankruptcy of a corporation, by reason of the Act of Congress of June 18, 1934, 28 U. S. C. A., Sec. 124(a).

2. That the Act of Congress of June 18, 1934, 28 U. S. C. A., Sec. 124(a), makes the Franchise Tax which was made payable by the corporation under the California Bank and Corporation Franchise Tax Act, to be payable by the Trustee in Bankruptcy of such corporation by reason of the trustee, as such, conducting business of the bankruptcy estate under authority of the court, notwithstanding that the bankrupt corporation was itself operating under its franchise outside of bankruptcy.

3. That the Act of Congress of June 18, 1934, 28 U. S. C. A., Sec. 124(a), gave to a trustee in bankruptcy of a corporation the status of a California corporation for the purpose of the California Bank and Corporation Franchise Tax Act as if he were a corporation, despite the fact that the corporation itself had previously and in the year 1936, been discharged from bankruptcy, and was during the year 1935 and thereafter in full possession and operation of its corporate franchise and was subject to a corporate fran-

chise tax for the privilege of exercising its corporate franchise during that year.

4. That the Act of Congress of June 18, 1934, 28 U. S. C. A., Sec. 124(a), imposed a State tax upon the Trustee in Bankruptcy of a corporation, for the benefit of the State of California.

The Court stated in its judgment and decree:

> "The trustee, appointed after June 18, 1934, by a United States Court, conducted the business theretofore carried on by Walker's, Inc., then subject to the franchise tax as it would have continued to be had it not gone into bankruptcy." (19 A. C. 164, 165; 119 Pac. (2d) 729, 730.)

The Court further stated:

> "There is no need to amend the Bank and Corporation Franchise Tax Act to specify that a trustee in bankruptcy conducting the business of a corporation shall be subject to the tax as if he were a corporation in order to insure that an intervening bankruptcy will not interrupt the application of the tax." (19 A. C. 164, 166; 119 Pac. (2d) 729, 730.)

The Court further stated:

> "The Act of Congress already provides that state taxes are as applicable to such a business as if it were conducted by a corporation, and this gives to the trustee the status of a corporation for the purpose of the tax. That status is determined by Congress in the exercise of its plenary authority over the administration of a bankrupt's estate. * * * Congress creates the trusteeship, fixes the conditions of its existence and may provide, as in the act of 1934, that a trustee be regarded as of such a nature as to come within the range of state tax laws." (19 A. C. 164-167; 119 Pac. (2d) 129, 730.)

E.

Substantiality of Questions Involved.

The appellant respectfully represents that the questions involved in its appeal to the Supreme Court of the United States are of a substantial nature. It is well established that an appeal will not be dismissed for want of a substantial Federal question, unless the contentions of the appellant are "clearly not debatable and utterly lacking in merit".

Hamilton v. *Regents of University of California*, 293 U. S. 245, 258; 79 L. ed. 343, 350.

The issue raised by the appellant's contention that the California Bank and Corporation Franchise Tax Act, as construed by the Supreme Court of the State of California, violates the taxing clause of Article 1, Sec. 8, Clause 1 of the Constitution of the United States, and also Amendment X thereof, and the said Act of Congress of June 18, 1934, 28 U. S. C. A., Sec. 124(a), involves the power of the Congress of the United States to impose a State Corporation Franchise Tax upon a Trustee in Bankruptcy of a corporation, for the benefit of the State of California.

The California Bank and Corporation Franchise Tax Act provides that, excepting financial corporations, every corporation doing business in California, not expressly exempted from taxation, shall annually pay to the State, *for the privilege of exercising its corporate franchises* within the State, a tax known as the Corporate Franchise Tax. (California Statutes 1929, p. 19, as amended by Statutes 1935, pp. 959, 995.) Said California Statute does not lay a tax *on the conduct of business* by a corporation.

The Act of Congress of June 18, 1934, provides that a trustee in bankruptcy of a bankrupt corporation who con-

ducts any business is subject to State and local taxes which the bankrupt would be subject to by reason of the bankrupt doing those things which the trustee does.

The holding by the Supreme Court of the State of California and said California Corporation Franchise Tax Act subjected the Trustee in Bankruptcy to the payment of the California Corporation Franchise Tax by reason of the transaction of business by such trustee, renders the said California Act repugnant to the Act of Congress of June 18, 1934, 28 U. S. C. A., Sec. 124(a), and renders said California Franchise Tax Act, as construed by said Supreme Court of the State of California, in contravention of and repugnant to Art. 1, Sec. 8, Clause 1 of the Constitution of the United States, and to Amendment X to the Constitution of the United States.

The construction placed upon the said California State Franchise Tax Act by the Supreme Court of the State of California, in holding that said State Franchise Tax Act, by reason of said Act of Congress of June 18, 1834, gave to the Trustee in Bankruptcy the status of a California corporation and made said trustee, by reason of his having transacted business in the State of California, liable for the payment of the California State Corporation Franchise Tax, makes said California State Franchise Tax Act unconstitutional and in violation of Article 1, Sec. 8, Clause 1 of the Constitution of the United States, and in violation of Amendment X of the Constitution of the United States, and is repugnant to the said Act of Congress of June 18, 1934, because it involves the power of the Congress to give to the Trustee in Bankruptcy the status of a California corporation for the purpose of the tax only, and then makes such trustee, by reason of such status, liable for the payment of a tax imposed by the State of California, for a privilege not exercised by the Trustee in Bankruptcy, for the benefit of the State of California.

This appeal presents questions, the determination of which is important in the administration of practically every corporation bankruptcy matter had in the several States, at least in every State which has a Corporation Franchise Tax Act which, as does the California Act, imposes a Franchise Tax upon a corporation *for the privilege of exercising its corporate franchises* within the State.

Under a State Franchise Tax Act which taxes a corporation *for the privilege of exercising its corporation franchise*, within the State, does the Act of Congress of June 18, 1934, 28 U. S. C., Sec. 124(a), make a Trustee in Bankruptcy, of a corporation, liable for the payment of a corporation franchise tax by reason of him, as such trustee, conducting the business of the bankruptcy estate? A decision by the Supreme Court of the United States in the present case will remove the uncertainty which now exists by reason of said Act of Congress of June 18, 1934.

If the Act of Congress of the United States of June 18, 1934, 28 U. S. C. A., Sec. 124(a), purports to give to a trustee the status of a California Corporation for the purpose of imposing a tax on such trustee for the benefit of the State of California, is said Act of Congress, as thus construed, repugnant to Article 1, Section 8, Clause 1 of the Constitution of the United States and repugnant to Amendment X of the Constitution of the United States?

F.

Cases Sustaining the Jurisdiction.

The Supreme Court of the United States has jurisdiction to entertain an appeal from the decision of the Supreme Court of the State of California on the ground that a State Statute, under the construction placed upon it by said Supreme Court of the State of California, violates certain clauses of the Constitution of the United States

and is repugnant to a certain Act of the Congress of the United States.

Merchants National Bank v. *Richmond,* 256 U. S. 635, 637; 65 L. Ed. 1135, 1137;

United Fuel Gas Co. v. *Hallanan,* 257 U. S. 277, 280, 66 L. Ed. 234, 238;

Hanover Fire Insurance Company v. *Patrick J. Carr, County Treasurer,* 272 U. S. 494, 509, 71 L. Ed. 372, 380;

Ex Parte Worcester County Natl. Bank etc., 279 U. S. 347, 359; 73 L. Ed. 733, 738;

Fiske v. *Kansas,* 274 U. S. 380, 385; 71 L. Ed. 1108, 1111;

State Tax Commissioner v. *Van Cott,* 306 U. S. 511, 514; 83 L. Ed. 950, 952.

THEREFORE, the appellant, Fifth Street Building, a corporation, respectfully submits that the Supreme Court of the United States has jurisdiction of this appeal by virtue of Section 344(a) of Title 28 of the United States Code.

Respectfully submitted,

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